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In the Supreme Court of the United States

No. 545.

OCTOBER TERM, 1958.

FRED N. ACKER,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

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FACTS AND FIGURES.

The short statement of taxable income in the Respondent's brief on page 4 should not be permitted to detract our attention from the real issue in this case. If the Court is interested in figures, then the statistical facts (all of them—not totals which are meaningless by themselves) are detailed on page 3 in the Petitioner's application for a Writ.

In 1947 the Commissioner says that the taxpayer had a taxable income of $9,412.00, but actually the taxpayer had a genuine money loss of $11,901.38. In 1948 the Commissioner says the income was $15,968.13, but actually the taxpayer's income was $4,009.57. The difference is not in mathematics but in the law. The law alters facts

arbitrarily. The result is that the taxpayer is being taxed at the rate of 767% of his LOSS in 1947 and for 89% of his gain in 1948. Moreover, the taxpayer has not been taxed in proportion to his income but progressively. He has been subdivided and taxed twice—first as the basic man and again as the surtax man.

TAXES OR CONFISCATION.

The Solicitor of the United States seems to make light of this situation and to pass it off as just routine. In fact it is routine procedure. For him to pretend that the above result is not confiscatory, excessive or destructive is an absurdity. To be exact, the Tax Court and the Commissioner's briefs in the lower courts proceeded precisely on the assumption that the Government must have an unlimited power to tax or lose the instant case. It was this situation that gave meaning to the Commissioner's claim that the Government has an unlimited power to tax even though the tax is confiscatory, excessive or destructive.

The statement by the Tax Court about the absolute taxing power of the Government might be thought to be an exaggeration, but the Commissioner did not think so. Nor did the Attorney General of the United States think it was a mistake. He repeated this claim verbatim in his brief before the Court of Appeals.

When Government counsel argued this contention before the Court of Appeals in answer to an inquiry by the Court, she reasserted this claim and was met by spontaneous laughter. When, later on, the same inquiry was repeated, the Government's counsel stood silent for a long period and rather than answer the question, terminated the Government's case with the statement, "The Court knows very well that I have been trying to avoid answer-

ing that question," and sat down in confusion to the renewed laughter of every person in the courtroom.

It was a sad performance. The Petitioner felt great sympathy for the Government's counsel who was being forced to defend the indefensible against her evident personal conviction.

COURT OF APPEALS DECISION.

Considering what the reviewing court had to say about the power to tax, one would have thought it conclusive that they would grant the Petitioner some relief. Instead, they hedged. They cloaked themselves in the statement, "Nor can we say that the rates of tax, admittedly high, have reached confiscation or 'taking' in the constitutional sense." What does that mean? There was nothing to elucidate or explain the words "constitutional sense." Because it was a hard question politically, the Court elected to do nothing. As long as the problem was general they knew the answers, but when it came to the specific, the Court preferred to pass it on to the Supreme Court. They knew it must end there. The Court understood very well that while the title to the case was "Acker vs. Commissioner," the real parties were the PEOPLE vs. the Commissioner—the individual citizen as a free and equal man vs. the unlimited power to tax.

THE SOLICITOR HESITATES.

In this Court the Solicitor General avoids repeating the claim of an unlimited power to tax, but he does not say one word to repudiate the claim. He cannot do so because he knows as well as the world knows that taxes of 50% at $16,000, and 75% at $50,000, and 91% over $100,000 is confiscation. So is the arbitrary disallowance

of losses AS losses confiscation. He knows that the arbitrary segregation of people into economic categories is contrary to the principle of equality. But he does not have the fortitude to say it openly so that everybody in America and the world will plainly understand that the Constitution is dead in the matter of money as between him and the Bureau of Internal Revenue. Let us be honest. If the Commissioner of Internal Revenue has an unlimited power to tax, he is in truth also the Commissar of Confiscation.

If you consider these words too harsh, what do you call the claim, "Congress has the power to tax even though the taxes are confiscatory, excessive or destructive"?

By way of answer, this taxpayer has always been of the opinion that the purpose of government is the protection of the citizen in his person and his property. Too many of our leaders have lost their wisdom, and so the people perish. Truly enough, not in a cataclysm, but slowly by decay of the spirit. Such is the lesson of history to those who have eyes to see and minds to think. Hindsight we all have, but foresight is the property of the wise.

THE CASES.

The Respondent's brief makes reference to five very well-known tax cases on the theory that they support the general thesis of an unlimited power to tax. This is not the time to individually analyze these cases beyond the absolute statement that not one of these cases taken separately or in combination support a GENERAL REVENUE BILL that is confiscatory, excessive or destructive. On the contrary, they do the reverse. True, the 1916 *Brushaber* case does support a progressive tax, but at rates that compare to the present rates like a mouse does to an elephant.

What the Court did in 1916, they did almost innocently, believing that Congress would keep within the bounds of reason and decency. They were wrong, as the intervening years amply demonstrate.

We have long reached the point of naked confiscation. What the Supreme Court did not believe would happen, they also knew could happen. And so, Chief Justice White, as already noticed in the Petitioner's brief in main, promised to review the principle of progression if it got out of hand. This Petitioner now most respectfully urges this Court to REDEEM this solemn promise.

EQUAL JUSTICE UNDER LAW MUST BE LIVED.

The world watches what we do here. In a very large sense we have visibly lost our leadership in the Court of Nations in the exact proportion that we have abandoned our fundamental principles. Right now the World seems to be in an era of taking stock of itself. Europe seems to be settling down and rediscovering the old virtues. We, too, could profit by rediscovering the source of our own greatness.

The immense good that this Court could accomplish with a soundly reasoned opinion on the fundamentals of taxation within the framework of our constitutional background would amaze even ourselves. Why not say now what must be said in the end in any event? The power to tax is not the power to confiscate.

Respectfully submitted.

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